

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH TATE,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 254868

Wayne Circuit Court

LC No. 99-012340

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying his motion for a new trial. We reverse and remand for a new trial.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty-five to forty years for the murder conviction and five to ten years for the assault conviction, to be served consecutive to a two-year term for the felony-firearm conviction. The convictions arose from a drive-by shooting in which Toriano Collins (known as "T") was killed, and Robert Madden was knocked down by a bullet that hit his zipper. Defendant was linked to the crime by Madden, who identified defendant as the shooter. Defendant was tried jointly with a codefendant, Dale Harper, who was also convicted of second-degree murder and assault with intent to do great bodily harm less than murder. The trial court denied defendant's posttrial motion for a new trial.

In a prior appeal, this Court originally determined that the trial court abused its discretion in denying defendant's motion for a new trial based on newly discovered evidence. *People v Tate*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No. 231230). This Court's decision focused on an affidavit from a prison inmate, Richard Eddings, concerning his knowledge of facts indicating that the perpetrators were two other men, known as Pooh and Red. The trial court had determined that this newly discovered evidence would not have led to a different result. *Id.*, slip op, p 4. This Court explained that the trial court's determination that the evidence would probably not have altered the outcome of the trial was not conclusive. *Id.*, slip op, p 5. As explained by this Court, "The trial testimony of the prosecution's sole eyewitness, Robert Madden, was full of contradictions and his ability to perceive the shooter deeply questionable, at best." *Id.* This Court explained in detail the

weaknesses of Madden's testimony, including the fact that Madden claimed in a taped interview with defense counsel that defendant was not the shooter and that Madden had been pressured by the police to identify defendant. *Id.*, slip op, p 6.

The prosecution filed a motion for reconsideration of this Court's opinion, and this Court granted the motion as follows:

This Court orders that the motion for rehearing is granted to the limited extent that the remand for new trial is modified as follows: On remand, within 42 days of the Clerk's certification of this order, the court shall conduct a hearing at which defendant shall present the inmate affiant's testimony, and any other evidence in support of his motion for new trial. If the testimony is substantially in accord with the affidavit, a new trial shall be granted. If the inmate is not produced, or the testimony is not substantially in accord, the trial court shall either grant or deny the motion based on the record made, and consistent with our opinion. [*People v Tate*, unpublished order of the Court of Appeals, entered September 22, 2003 (Docket No. 231230).]

On remand, the trial court held an evidentiary hearing at which the affiant of the affidavit, Richard Eddings, testified. Following the hearing, the trial court ruled that Eddings' did not testify substantially in accord with his affidavit. The court concluded without explanation that his testimony was not credible.

On appeal, defendant challenges the trial court's denial of his motion for a new trial, arguing that there were only minor differences between Eddings' affidavit and his testimony at the evidentiary hearing, that Eddings' testimony was substantially in accord with his affidavit, and that the minor differences were reasonable given that the affidavit was prepared three years earlier. According to defendant, the discrepancies pointed out by the court had no bearing on the critical information that Eddings provided.

Generally, "[t]his Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. A mere difference in judicial opinion does not establish an abuse of discretion. A trial court's factual findings are reviewed for clear error." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003) (citations omitted). Here, however, this Court remanded the case to the trial court for the purpose of an evidentiary hearing and ordered the court to grant a new trial "[i]f the testimony is substantially in accord with the affidavit" In this context, the issue before this Court is whether the trial court complied with this Court's remand order. In that regard, our standard of review is de novo. See *City of Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998).

The contents of Eddings' affidavit were summarized in this Court's previous opinion as follows:

The inmate stated in his affidavit that he had worked as a doorman at a crack house at 1217 Dragoon Street. He stated that a guy he knew as "T" started to sell drugs on Military Street, and T began taking away business from the Dragoon house. The inmate described T as around 250 lbs., about 6'1" or 6'2", and as selling drugs out of a house next door to Viola's, with whom he (the

inmate) was friends. The inmate's affidavit stated that he witnessed T shoot into the Dragoon house on November 20, 1999, that he so informed "Red," the drug dealer who ran the Dragoon house, and an associate of Red's named "Pooh," that Red and Pooh had him (the inmate) drive to where T was and point T out to them, which he did, and that the day after he had seen T shoot at the Dragoon house, he called Red and heard Pooh brag about killing T and "just missing" another man. The inmate's affidavit also stated that Viola told him that she saw two men get out of a blue van and shoot T, that Pooh drives a blue van and keeps an assault weapon in the back, and that he, the inmate, had personal knowledge that Pooh had used that van to commit other acts of assault and that he kept an assault rifle in the van. The affidavit described Pooh as about 26-27 years old, about 5'11" and about 270 lbs. The inmate described Pooh's van as medium blue, customized, with a round window on one side, tinted windows on both sides, and stated that he thought it was a 1986 or 1987 Chevy. The affidavit stated that "after Pooh shot T, he knew and bragged that he would not be arrested for doing it and continued to drive around in the blue van with the assault rifle in the back." It stated that "[a]fter T was shot, Pooh and Red moved their drug house from 1217 Dragoon to Fort and Dragoon, closer to T's old territory on the south side of the bridge." The affidavit stated "I know that Pooh was picked up and arrested by the 4th Precinct, before he shot T, in the same blue van that Viola saw him use the night that T was shot." It further stated that there had been a raid on 1217 Dragoon and that he heard two police officers, "Robocop" and Sanchez, say they suspected Red of being involved with T's murder. He stated that a lot of people thought "Lucky" (defendant Tate's nickname) had something to do with the house on Dragoon being shot up, but that he knew that T had done it. The affidavit stated that he knew Lucky, but did not know Dale Harper (co-defendant to defendant Tate), but that he spoke to Harper in jail and said he would speak to Harper's lawyer. He met with Harper's lawyer on October 14, 2000. The inmate's affidavit ends by stating the he never talked to the police about T's murder because he feared retaliation, and the police never questioned him. The affidavit also stated that Pooh and Red were related, and that Pooh and Red had talked about coming from Texas originally. [*Tate, supra*, slip op, pp 2-3.]

At the evidentiary hearing, Eddings testified he used to work as a doorman for "Red" at a drug house on Dragoon Street. Pooh was a "lieutenant, like" in Red's group. Pooh drove a blue van, "like a Chevrolet van." Red had four or five chrome-plated guns of different calibers, one of which was an AK-47, which he frequently displayed in the van. Eddings knew "T," the enforcer of another drug operation in a field approximately four or five blocks away between Military and Cavalry streets, across the street from the neighbor Viola's house. That drug house was established before "Red and them, you know, came." Eddings and T "had some words before" involving an "altercation" over some firecrackers about six months before the shooting.

Eddings testified that he told Red "if you know, actually they were taking these people's business, that naturally they were probably going to retaliate, which always happens when a new group moves in someone's territory. And I told him that I could show him the guy," i.e., T. Eddings told Red that "if these other people retaliate or something like that, he'd probably be the one to initiate it, you know." At some point in time, Eddings pointed T out to Red.

In November 1999, the drug house on Dragoon “got shot up.”¹ Eddings was at the house at the time. Eddings claimed that he was walking a girl out to the fence, which was approximately ten feet away from the door, and three individuals came around the corner. He recognized T. Eddings did not see any weapons at the time, but knew they had some guns “because of my culture just probably could tell a person carrying a gun just by the way you walk or what they’re wearing, you know.” He also saw they had “rocket bottles” which he suspected were filled with gasoline. He therefore went in the house and told everyone that it was going to get shot up. According to Eddings, after he warned everybody and shut the door, “they [the individuals outside the house] . . . just started shooting.” “They shot on an angle and they shot a lot of times. Probably about thirty times with three different kinds of weapons.”

Eddings claimed that Red came to the house approximately five minutes after the shooting. Someone other than Eddings had called him. Red asked what happened. Eddings said, “well you can see what happened.” Red asked if the perpetrators were from across the bridge and Eddings indicated he had seen one of them. “I told him, you know, I said, well, I told you who was going to come over here. And he said, okay, was it him? I said, yes, I seen him.”

Red gave Eddings his drugs to sell, but Eddings left the area. In the afternoon of the following day, Eddings called to speak to Red concerning the drugs. One of Red’s workers answered the phone. Eddings claimed that he heard Red and Pooh having a conversation in the background during which the men discussed the shooting involving T. Eddings heard Pooh say in the background and in a later conversation at the house that he went up to “Carl,” grabbed him and said, “Oh, you ain’t dead yet, mother f**ker, but you will be, you know.” Red “was, like, yes, we’ll go back and get that mother f**ker. I don’t care about it being broad daylight. Somebody messed with my place, or f*** with my place, that’s what they get.” Eventually, Eddings spoke with Red on the phone, but did not mention what he heard. Red told him to meet him over at the house on Dragoon. Eddings did not go there right away.

Eddings went to Viola’s house and, as he approached, he saw a Dodgers hat like T frequently wore and a lot of teddy bears on the porch next to Viola’s house. Some men who sold in the field appeared to look at Eddings “real oddly and strangely,” but Eddings did not know why. Once he was in Viola’s house, she told him that “they” killed T and suggested that Eddings was probably involved. Eddings left Viola’s house and headed for the house on Dragoon Street. While going over there, “people was talking about the bits and pieces of it; the van, some type of descriptions that I could notice, you know. And they described the van.” “Because the people were talking about how it was done, you know, broad daylight with, I guess, with kids and stuff still out there, you know.”

Eddings testified that when he got to the house on Dragoon Street, Red was there. “That’s when I said, Red, did you, somebody killed that cat T, man. And he said, well, yes, that’s what I do for my doorman. You’re the only one know that.” Eddings also described the

¹ The prosecution had evidence concerning a shooting/firebombing at 1217 Dragoon before defendant’s trial. The parties stipulated that the evidence would not be presented. See *Tate*, *supra*, slip op 3 n 2.

conversation as “I just said, you heard about that guy T, right? And he’s, like, yes, I know about it, he said, that’s what I do for my doorman. You’re the only one who know that.” Eddings believed that although Red did the shooting for retaliation on his house, he also “wanted to make me feel good, because he knew me and the guy had a beef before”

At some unspecified time after the shooting, but not during the phone call, Pooh bragged about killing T, but Eddings believed that Red did it.

After the evidentiary hearing, the trial court compared Eddings’ testimony to his earlier affidavit. According to the court, the most substantial discrepancy was that Eddings testified that he had heard Red refer to “popp[ing]” the victim, but in his affidavit he averred, “I heard Pooh brag about killing T and he said, “I smoked that mother f**ker. I just missed that other mother f**ker.” Other discrepancies identified by the court concerned the physical appearance of T (whether he was 6’1” to 6’2” or 6’3” to 6’4”), the location where T’s operation was selling drugs (in a house next door to Viola’s or an empty field across the street), and the occasion when Red stated “that’s what I do for my doorman” (during the phone conversation or later at the house on Dragoon). The trial court also adopted inconsistencies identified in a memorandum prepared by the prosecution. In that memorandum, the prosecution noted that Eddings had averred that he saw T shoot into the house on Dragoon, but only testified that he saw T approach the house and heard shots without explicitly stating that he saw T firing the shots. The prosecution correctly noted a discrepancy between where Eddings heard that one of the perpetrators approached “Carl”² and said words similar to, “You’re not dead yet, but you will be.” Eddings averred that Viola told him that was said by one of the “guys,” but Eddings testified that he heard Pooh say that in the telephone conversation and later at the house.

The portions of the prosecution’s memorandum adopted by the trial court also noted purported discrepancies between Eddings’ testimony at the evidentiary hearing compared to testimony by other witnesses at defendant’s trial. These include Eddings’ testimony concerning Red’s references to the shooting occurring during broad daylight, as opposed to the trial testimony that indicated that the shooting occurred at 7:30 p.m. on November 21, 1999. The prosecution also noted that in Eddings’ affidavit and testimony, he said that “someone had grabbed “Carl” after T was shot and told him he wasn’t dead yet, but would be,” but at trial, Madden never mentioned the incident. The prosecution further noted:

The court should recall that at trial, Madden was impeached by a tape that Tate’s counsel had made of a conversation she had with him. Parts of the tape were admitted at trial, but none of it even hinted that someone approached Madden at the scene and talked with him. None of that conversation established that either the shooter or the driver got out of the vehicle.

The prosecution is correct that Madden’s account of the shooting at trial did not refer to a perpetrator approaching him *during the shooting incident* and threatening him in that manner. The prosecution is also correct that during the taped conversation, Madden did not indicate that a

² Madden was also referred to below as Carl.

perpetrator approached him *at the scene*. However, according to the transcript of the taped conversation between Madden and defense counsel attached to defendant's motion for a new trial, Madden referred to a similar conversation that purportedly occurred at the store:

[Defense counsel]: Were they trying to kill you too[?]

Carl: Yeah[.]

[Defense counsel]: That wasn't an accident[.]

Carl: Yeah, no. When I went to the store down here I was standing around you know I know all these people. I was standing around here with all my friends. A guy walks up to my car and he grabs this coat. "You ain't dead yet but you will be."

The assumption of the prosecution's argument that Eddings' account is inconsistent with the trial testimony is that Eddings indicated that he was told that the perpetrator approached and made the statement, "You're not dead yet but you will be," *at the time of the shooting*. The incident may have occurred at another time, as indicated by Madden in the taped statement.

Although we recognize that Eddings' testimony did not mimic his affidavit, we conclude that the discrepancies did not relate to the substance of the affidavit. The substance of the affidavit was that T was involved in a rival drug operation, that Eddings pointed him out to Red, and that T shot into Red's drug house on Dagoon the day before T was killed. Then, in the background of a phone call, Eddings heard Red and Pooh discussing their involvement in a shooting that Eddings understood as referring to T. The testimony at the evidentiary hearing confirmed these essential points and developed them. In spite of the discrepancies, we conclude that the testimony was "substantially in accord" with the affidavit. Moreover, many of the discrepancies cited by the trial court were not related to the key issue, the perpetrator of the shooting. A height disparity of two to three inches, the exact location of drug sales, and the timing of a statement did not alter the fact that the testimony was nonetheless substantially consistent with the affidavit. Based on this Court's directive in the prior appeal, the trial court erred in failing to grant defendant a new trial.

Under the circumstances, the trial court's assessment of Eddings' credibility does not compel a different result. Generally, a trial court may evaluate credibility in deciding a motion for a new trial, *Cress, supra* at 693-694, and a reviewing court must give due regard to the trial court's opportunity to appraise the witness, *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). However, a trial court's evaluation of the credibility of a witness in deciding a motion for a new trial may constitute an abuse of discretion. See, e.g., *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). In this case, the trial court did not provide any rationale for its determination that Eddings was not credible other than the purported discrepancies previously discussed. Under the circumstances, we decline to give determinative weight to the court's assessment of Eddings' credibility based on minor or insignificant variations between Eddings' affidavit and testimony at the evidentiary hearing. In light of the weaknesses and inconsistencies in Madden's testimony at trial, the importance of Eddings' account, and the insignificance of the discrepancies identified by the trial court, defendant is entitled to a new trial where defendant will have the opportunity to present Eddings' testimony to

the trier of fact. The discrepancies may be fodder for intensive cross-examination by the prosecution; they do not provide a basis for rejecting defendant's motion for new trial.

Reversed and remanded for a new trial.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello